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DISCUSSION RESPONSE

Respect and Protection of International Law Beyond the Borders (of Human Rights)

VASSILIS TZEVELEKOS — 24 June, 2015

A response to Heta Heiskanen & Juka Viljanen

Heta-Elena Heiskanen and Jukka Viljanen kindly invited me to comment on their blog note discussing certain points stemming from their recent paper on extraterritoriality within the ECHR regime. The paper revisits the relevant case law of the ECtHR on extraterritoriality and invites us to consider that similar concerns may arise in the context of environmental protection as well. As its analysis demonstrates, this is also possible because the ECtHR's

expansive interpretation of the ECHR has labelled certain aspects of environmental protection as human rights safeguarded by the said instrument. ECHR-based environmental rights may develop extraterritorial effects to the extent and under the conditions that all other ECHR rights do.

The few points I make in this note are an attempt to explain why I find the argument by Heiskanen and Viljanen regarding extraterritoriality and environmental protection convincing, but also to briefly present the main parameters of a broader framework (that I recently discussed in this paper) that allows environmental law, as well as other areas of law and, more generally, a considerable number of factual situations and social phenomena in the realm of globalisation, to raise similar questions about the exercise of extraterritorial jurisdiction by states. Beyond the ECHR being a basis for environmental rights, what I think permits raising the question of the extraterritoriality of environmental protection is the many similarities this shares with human rights. They both aim at protecting common state interests and values; primarily, the two regimes require states not only to abstain from causing a wrongful result, but also to be proactive as protectors. This reflects the distinction between the so-called negative and positive state obligations. Apart from providing a useful analytical framework for evaluating the case law of the ECtHR on extraterritoriality, this distinction calls us to consider how the dipole of negative/positive obligations may serve as a basis for appraising extraterritoriality in more general terms and beyond human rights. Indeed, that regime of law is one only of the areas/questions where the dipole works in the context of extraterritoriality.

The distinction between negative and positive obligations corresponds to the two first strands of the tripartite classification of human rights obligations on the basis of respect – protection – fulfilment. The importance of differentiating between these two facets of state duties, is that it allows us to understand how the scope of an obligation changes and associate protection with the principle of due diligence. This requires that states not only be neutral and refrain from directly causing wrongfulness (negative aspect of an obligation), but also be proactive and make use of the means that are available to them in order to prevent and punish wrongfulness.

This has a number of consequences. First, in terms of primary law, negative obligations are of result. The state needs to guarantee that it will not cause the prohibited result. On the contrary, positive obligations are of means/conduct. Rather than guaranteeing the result, the state is expected to be vigilant and make good use of its resources and power with a view to offer protection. This raises a number of questions regarding the standards of conduct that can reasonably be expected from a state, vis-à-vis to whom protection shall be offered and the factors that activate due diligence, i.e. when does a state have an obligation to protect. In terms of secondary obligations, for state responsibility to be established for the failure of a state to adequately protect (or, more generally, demonstrate due diligence) a number of elements need to be considered, such as the particular circumstances of a case and what these require or allow the state to do, but also the availability of the necessary means. Heiskanen and Viljanen are very right to identify knowledge as an element to be taken into account. A state cannot be held liable for lack of diligence unless it is aware of the wrongful situation or the

danger/threat/risk that exists for the enjoyment of a right that it is expected to protect. This also raises the question of the pertinence of scientific knowledge regarding risks/dangers for rights –which is of special importance for environmental protection as well. On the contrary, in the case of negative obligations, what primarily counts is the illegal result. If this is caused through conduct attributable to the state, and provided that no circumstances precluding wrongfulness exist, the state shall be liable.

To focus on extraterritoriality, the distinction between positive and negative obligations also requires us to consider the different role effective control may play in each one of these two frameworks. My argument is that its role is not the same in both cases. The ECtHR holds that effective control is a precondition for the ECHR to develop extraterritorial effects. I argue that the role of effective control shall be limited to attribution (de facto organ) as a criterion for identifying the author of a wrong. After establishing the subject to which wrongfulness is attributable, effective control has no value. States should not be allowed to directly violate human rights (and more generally international law) outside their territory irrespective of whether they exercise effective control or not. In positive obligations, the role of that criterion is different. Among other possible functions, effective control (and effectiveness, more generally) serves as a criterion for establishing the standards of conduct expected from the state and, consequently, for assessing its fault/negligence. The more effective the control a state exercises is, the more it can do. The more it can do, the more it is legally expected in the light of due diligence (being an obligation of means) to do.

In the context of extraterritoriality, negative and positive obligations complement one another in a way that permits holding multiple states liable for the same wrongful situation. When, for instance, state X is directly causing a wrong, other states that have the obligation to demonstrate diligence may end up being concurrently responsible for their omissions to protect from the wrongfulness of X. Transnational phenomena/situations necessarily involve more than one states. This results in the exercise of complementary and often overlapping jurisdiction in the light of diligence by more than one states -each one being involved on a different basis that links it to the situation, such as the protection of its nationals. Yet, it needs to be highlighted that due diligence/positive obligations are not the only scenario of shared responsibility. If, for instance, a state is proven to be involved in a more active way than simply passively tolerating (i.e. omitting to prevent/react to) the conduct of another state, alternative legal bases exist that allow holding the former state responsible. The framework is that of derived responsibility of a state because of/linked to the conduct of another state. One might think in that respect complicity in the form of aiding and assisting the wrongful conduct of another state.

To conclude, Heiskanen's and Viljanen's astute analysis observes that extraterritoriality touches environmental protection, too. I fully concur with them, adding that this is the case even when environmental protection is not labelled as human rights. The negative v. positive duties framework explains why this is so. Economic globalisation makes it very common that the nationals of a state cause environmental harm through activities on the territory of another state. Environmental law is equally often transboundary in nature. In these cases, environment becomes a matter of more than

one states -acting as protectors- and their respective jurisdictions. This is how extraterritoriality comes into play.

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